THE REQUIREMENT OF PRIVITY IN ENFORCING A WARRANTY

Welsh v. Redyard
167 Ohio St. 57, 146 N.E. 2d 299 (1957)

The plaintiff's husband bought an electric cooker from the defendant, a retail dealer. The vendee's wife, the plaintiff, was using the cooker in the manner in which such cookers are ordinarily used, when it gave her an electric shock, exploded and injured her. The plaintiff conceded that the action was not based on negligence. She founded her action on a warranty of fitness for the use to which she had put it. The court held there were not sufficient allegations to support a determination that the husband had made a contract with the defendant for the benefit of his wife or that he had acted as his wife's agent; hence the court did not pass upon these issues.

The plaintiff's chief contention was that the implied warranty of fitness for a particular use extended to her; that the defendant warranted and held out to the general public, and more especially to the plaintiff, that the article was fit for the use for which it was sold and to which the plaintiff put it. The Ohio Supreme Court held that privity of contract is necessary to recover on an implied warranty of fitness. Two judges dissented without opinion.

Generally privity is said to be required for a recovery under an implied warranty.[1] Most courts hold that a warranty is a contract and there must be a contractual relationship, i.e. privity. Professor Williston indicates that this is not a necessary conclusion since:

> A warranty is in many cases imposed by law not in accordance with the intention of the parties; and in its origin was enforced in an action sounding in tort, based on the plaintiff's reliance on deceitful appearances or representations, rather than on a promise, and where forms of action are still differentiated, an action of tort is generally allowed even at the present day.[2]

Inroads on the privity doctrine have been made, particularly in sales of food.[3] These cases usually deal with an ultimate consumer suing the manufacturer or processor and give a cause of action to the purchaser where privity is dubious or not present at all. The courts have used theories calling for the warranty to run with the chattel as in real property transactions,[4] or that the dealer is a mere go-between to establish

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[1] 77 C.J.S., *Sales*, §305, p. 1123 (1952).

[2] 1 WILLISTON, *Sales* 649 (rev. ed. 1948).

[3] Coca-Cola Bottling Co. v. Smith, 97 S.W. 2d 761 (Tex. Civ. App. 1936); Chysky v. Drake Bros. Co., Inc., 192 App. Div. 186, 182 N.Y.S. 459 (1920); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Nemela v. Coca-Cola Bottling Co., 104 S.W. 2d 773 (Mo. 1937), Mazetti v. Armour, 75 Wash. 122, 135 P. 633 (1913).

[4] Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); VOLD, HANDBOOK

contacts for the manufacturer,[5] or that the plaintiff is a third party beneficiary, and intended to be such, by the defendant.[6] These cases demonstrate that the privity doctrine need not be so restrictive that it forecloses cases where there obviously should be a legal right in the plaintiff.

Is the agency theory to be the only protection for members of the purchaser's family where the husband or father buys articles intended to be used by his family in the manner for which sold? The results of such a doctrine can be extremely bizarre. Under such a theory it is probable that if the wife buys the food and her husband is injured, he has a cause of action as her principal.[7] But in the majority of cases the husband provides the means of support and so when he buys the food, he is a principal and an injured wife or child under this concept, cannot recover under an implied warranty.[8]

These strange results might be justified if warranty were strictly a contract action, but its origin is in tort.[9] It is an expression of the law's movement away from *caveat emptor*, an outmoded principle in our machine-age economy.[10]

When viewed in this light, an extension of the privity doctrine to include persons in the purchaser's family or guests who might be injured by the article used in the warranted fashion seems logical. The new Uniform Commercial Code, enacted to date in Pennsylvania and Massachusetts, proposes the idea by statute:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of this warranty. A seller may not exclude or limit the operation of this section.[11]

Some Ohio lower courts have shown the way to accomplish this purpose judicially. In *Tennebaum v. Pendergast* the plaintiff's husband bought a bottle of a carbonated beverage and gave it to the plaintiff. It exploded while in her possession and she was injured. The court held that within the terms of the statute "buyer" means a person who buys

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OF THE LAW OF SALES 475 (1931); 57 YALE L.J. 1405 (1948).

[5] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557, motion to certify overruled, 26 Ohio L. Rep. 189 (1928).

[6] Singer v. Fabelin, 24 N.Y.S. 2d 962 (1941).

[7] For examples of the agency theory in operation see comment 24 FORDHAM L. REV. 431 (1955).

[8] A number of jurisdictions make an exception to the privity requirement in food cases, but the majority probably still require privity. See 77 C.J.S., *Sales*, §305 p. 1127 (1952); Rubbo v. Hughes Provision Co., 138 Ohio St. 178, 34 N.E. 2d 402 (1941).

[9] 35 O. Jur., *Sales*, §155, p. 888.

[10] VOLD, *op. cit. supra*, note 4, p. 444-46.

[11] UNIFORM COMMERCIAL CODE §2-318; PA. STAT. ANN. tit. 12A, §2-318 (1954).

or any legal successor of such person and so the Ohio statute[12] encompasses the wife. Conceding that it might be argued that the wife was not a successor *in interest*, yet the transfer was at least a gift by implication and as such would be within the contemplation of the parties at the time.[13]

DiVello v. Gardner Machine Co.[14] extended the doctrine to include an employee injured by a grinding wheel which was purchased by his employer from the defendant. The court quoted from *Mannz v. MacWhyte:*[15] "The requirement of privity between the injured party and the manufacturer of the article which has injured him has been obliterated from Pennsylvania law."[16]

The trend is towards bringing warranty actions more within the reasonable framework of the protective policy of the law to the buyer who must place trust in his vendor in this day of complicated, nationally advertised, commercial products. The courts can do this by including *at least* the family within the meaning of "buyer" in section 1315.01 of the Ohio Revised Code.

The need is imperative because a negligence action, available under the doctrine of *MacPherson v. Buick,*[17] is many times worthless because of the practical difficulty of meeting the burden of proving negligence since the article passes through so many hands.

Inclusion of the family and guests of the vendee within the seller's implied warranty of fitness, where the article is used in the accustomed manner and causes personal injury, seems to be the logical step in placing the loss where it belongs.

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[12] OHIO REV. CODE, §1315.01(B): "Buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person."

[13] 55 Ohio L. Abs. 231 (C.P. Franklin Co. 1948).

[14] 65 Ohio L. Abs. 58, 102 N.E. 2d, 289, (C.P. Cuyahoga Co. 1951). This case was cited by Justice Jackson in his dissent in the *Texas City Case,* Dalelute v. U.S. 346 U.S. 15, 52 (1953).

[15] 155 F. 2d 449 (3rd Cir. 1948).

[16] The Pennsylvania law before the Uniform Commercial code was adopted in 1953, was at least tending toward stripping the need for privity in personal injury actions. The *Mannz* case contends privity was completely removed in personal injury actions. This same view is noted in Hunter-Wilson Distilling v. Foust Distilling Co., 84 F. Supp. 996 (DC.M.D. Pa. 1949). The general requirement for privity exists except where there is personal injury, but the Pennsylvania Bar Association contends the Pennsylvania cases had not gone so far as §2-318, Uniform Commercial Code. See 12A PURDON'S PENNA. STAT. ANN. 199 (1954). The point that had been reached by the Pennsylvania courts is not clear but the direction of movement was with the *DiVello* view.

[17] 217 N.Y. 382, 111 N.E. 1050 (1916), followed in White Sewing Machine Co. v. Feisel, 28 Ohio App. 152, 162 N.E. 635 (1927).